

REVIEW

Enumerated Federal Power and the Necessary and Proper Clause

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The Origins of the Necessary and Proper Clause
Gary Lawson, Geoffrey P. Miller, Robert G. Natelson, and
Guy I. Seidman. Cambridge, 2010. Pp vii, 176.

Talk is cheap. Calling yourself the king of France will not replace the Fifth Republic with a monarchy. Americans love to talk about, extol, and announce their attachment to their Constitution. What, if anything, they mean by all of that is an important question.

On the second day of the current session of Congress, members of the House of Representatives went beyond talking about the Constitution and actually read most of it.¹ One day earlier, the House amended its rules to reflect a fundamental principle of the Constitution: enumerated federal power. House bills must now include a statement of the constitutional powers on which they rest.²

These statements may turn out to be repetitive and little more than cheap talk. Many of the statements likely will invoke Congress's taxing power, about which there can be no question.³ Many of them likely will invoke a purported power to spend government money for the common defense and general welfare, though the existence of such a power is denied by a tradition going back to James Madison.⁴ And

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¹ 157 Cong Rec H 54–62 (daily ed Jan 6, 2011).

² HR Res 5, § 2, 112th Cong, 1st Sess, in 157 Cong Rec H 7 (Jan 5, 2011) (amending Rule XII of the standing rules of the House of Representatives).

³ US Const Art I, § 8, cl 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”).

⁴ For the supposed source of the power to spend for the common defense and general welfare, see US Const Art I, § 8, cl 1. The problem is that this clause, while drafted on the assumption that tax revenue will be spent for the purposes described, is not formally a grant of power to spend money for those purposes, or any other. Moreover, the reference to the common defense and general welfare is in between a grant of power to tax and a limitation on that power—the uniformity requirement—suggesting that it too is a qualification of the taxing power.

many—probably most, possibly all—will invoke the Necessary and Proper Clause of Article I, § 8. These statements raise the question whether much of the federal government’s substantive legislation is based on an unduly broad reading of that clause and therefore inconsistent with the Constitution.

The Origins of the Necessary and Proper Clause casts new light on that question. Part I of this Review is about the Necessary and Proper Clause, briefly reviewing its central role in contemporary federal law and the recurring questions that arise in applying it. Part II recounts the book’s main arguments. Part III presents my views about the soundness and implications of the inferences that the authors draw from their evidence. Some of those inferences are more secure than others, and those that are secure make an important contribution to understanding the clause. Part IV discusses the broader questions of constitutional substance and interpretation that must be resolved in order to determine whether claims about the original textual meaning, or textual meaning in any sense, matter for American constitutional practice.

I. THE NECESSARY AND PROPER CLAUSE: CURRENT USE AND CONTROVERSIES

A. Congress’s Reliance on the Necessary and Proper Clause

The Constitution is overwhelmingly about power, and it contains many grants thereof to Congress, the President, the federal courts, and a few other recipients. Many of the powers of Congress are enumerated in Article I, § 8, which concludes with the Necessary and Proper Clause. This clause gives Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁵

That the Necessary and Proper Clause has become a central source of congressional authority is well known.⁶ For that reason I will note only a few examples to illustrate the point. Probably the most noteworthy are the many statutes adopted on the basis of the congressional power to regulate commerce among the several states, with foreign nations, and the Indian tribes, combined with the

An exposition of Madison’s position and of the subsequent debate appears in *United States v Butler*, 297 US 1, 65–69 (1936).

⁵ US Const Art I, § 8, cl 18.

⁶ See Ronald D. Rotunda and John E. Nowak, 1 *Treatise on Constitutional Law: Substance and Procedure* § 3.2(a) at 340–41 (West 3d ed 1999).

Necessary and Proper Clause. A common indication that the latter is doing much or almost all of the work is that the statutes apply to economic activity that is not commerce. The statutory sign of this is an invocation of the regulated activity's *effect* on commerce, which is a backhanded way of saying that the activity is not itself actually commerce. If the conduct in question were actually commerce, it would not be necessary to have the added category of conduct that affects commerce. But regulating the latter category goes beyond the regulation of commerce and so goes beyond the Commerce Clause proper. Regulating conduct that is not commerce because it affects commerce is legislating to carry into execution the power to regulate commerce and so rests on the Necessary and Proper Clause, not the Commerce Clause strictly speaking.

That is how the system of federal labor and employment law operates. The National Labor Relations Act⁷ (NLRA), which created the system of collective bargaining overseen by the National Labor Relations Board (NLRB), rests on a congressional finding that refusal to bargain collectively leads to strikes, which burden and obstruct interstate commerce.⁸ A similar rationale concerning effects on commerce underlies major employment discrimination laws like the Civil Rights Act of 1964⁹ (CRA) and the Age Discrimination in Employment Act¹⁰ (ADEA). Congress likewise regulates workplace safety through the Occupational Safety and Health Act¹¹ (OSHA) on this basis, whether the workplace is one of commerce as opposed, for example, to manufacturing.¹²

Although the commerce power is perhaps the most discussed primary congressional power that is linked to the Necessary and Proper Clause, it is of course not the only one. Indeed, it is quite possible that every enumerated power on the list has some important adjunct statute that is not based on a strict interpretation of that

⁷ Pub L No 74-198, 49 Stat 449 (1935), codified as amended at 29 USC § 151 et seq.

⁸ See 29 USC § 151.

⁹ Pub L No 88-352, 78 Stat 241, codified at 42 USC § 2000e et seq. The employment discrimination provisions of the CRA apply to employers in industries affecting commerce, 42 USC § 2000e(b), which is a broader category than industries engaged in commerce.

¹⁰ Pub L No 90-202, 81 Stat 602 (1967), codified at 29 USC § 621 et seq. The ADEA rests on a congressional finding that age discrimination burdens commerce and the free flow of goods in commerce. See 29 USC § 621(a)(4). As with the CRA, covered employers are defined as those in industries affecting commerce. See 29 USC § 630(b).

¹¹ Pub L No 91-596, 84 Stat 1590 (1970), codified at 29 USC § 651 et seq.

¹² OSHA begins with a congressional finding that workplace injuries are a hindrance to interstate commerce, see 29 USC § 651(a), followed by a statement of the purposes Congress is pursuing through the regulation of commerce. See 29 USC § 651(b). But working in a manufacturing facility is not, in general, commerce among the several states, although it may affect that commerce.

power. The federal statute that governs voting by members of the military in presidential elections and requires that states provide them with absentee ballots is one example.¹³ Ensuring military voting rights is useful to raising an army but does not constitute doing so. Even powers not on the main Article I list are sometimes implemented this way. The criminal ban on unauthorized use of the character Smokey Bear has its constitutional home in Congress's power over federal real estate in Article IV of the Constitution.¹⁴

To say that the Necessary and Proper Clause is routinely used is not to say that anything strange is going on. Of course Congress can turn federal forests into national parks and allow camping. And of course reminding campers to be careful with fire makes sense. And preserving Smokey Bear's status as a national icon is an effective means to this end. In contrast, the system of collective bargaining is a major feature of American law, but its connection to the interstate sale of goods is not nearly as close as Smokey Bear's connection to preventing forest fires. This is what makes the clause not only important, but problematic.

B. Determining the Extent of the Clause's Reach

The Necessary and Proper Clause is about means-ends connections. It authorizes Congress to pass laws in order to do something. Usually, Congress is authorized to pursue some primary goal by a provision of the Constitution other than the Necessary and Proper Clause, frequently one of its other enumerated powers. Most often, this primary goal is to further the policy of some statute that Congress is empowered to adopt. For example, Congress can establish post offices, the purpose of which is to handle the mail.¹⁵ A statute making it a crime to set fire to a post office with the intent of destroying the mail would further that purpose and therefore would be a means to the end of distributing the mail.¹⁶ I will refer to purposes like the safe distribution of the mail as primary goals, and statutes adopted on the basis of the Necessary and Proper Clause as secondary

¹³ The main statutory provision governing state responsibilities is 42 USC § 1973ff-1. I use its application to presidential elections as an example because Congress has separate powers over the times, places, and manner of elections for the House and the Senate, but presidential electors are to be chosen as determined by the state legislatures. Compare US Const Art I, § 4, cl 1; US Const Amend XVII, § 2, with US Const Art II, § 1, cl 4.

¹⁴ See 18 USC § 711. As the statute sets out, Smokey Bear was created by the Forest Service in the interest of preventing forest fires, especially in national forests.

¹⁵ US Const Art I, § 8, cl 7.

¹⁶ See 18 USC § 1705.

rules.¹⁷ The main questions under the clause can be formulated in these terms.

Perhaps the first such question is this: How strong must the means–end connection between the primary policy and the secondary rule be? That question in turn breaks down into two sub-questions, which may be called the absolute and comparative versions. The absolute version asks how much the secondary rule will advance the primary goal. The more the secondary rule contributes to achieving the primary goal, the stronger the argument that it is authorized by the clause. Thus, a statute punishing perjury in federal judicial proceedings pretty clearly makes a substantial contribution to the courts' factfinding function, an aspect of the judicial power that supplies a purpose under the clause.¹⁸ In similar fashion, a requirement that a large part of the population buy health coverage may well go a long way toward keeping health insurance companies solvent when they are subject to requirements that cause them to take losses on some of their contracts.¹⁹ By contrast, it is doubtful whether banning guns in the vicinity of schools would make a contribution to the quality of education so significant that it would also have an effect on the country's economic production.²⁰

Relative or comparative instrumental contributions may also matter, depending on how one reads the clause. A secondary rule may further the primary goal significantly, but there may be some other secondary rule that would accomplish the same goal, as well as some reason to prefer one to the other. For example, forbidding setting fire to post offices and forbidding bringing combustible materials within one hundred yards of a post office might be roughly equally effective in protecting post offices from arson, but the latter has substantially

¹⁷ By setting up the issues this way, I am suppressing many complexities. One that is important enough to note is whether one of Congress's primary powers can itself supply a permissible goal, even if Congress has not exercised that power. A common ground for invoking the necessary and proper power is Congress's power to maintain the free flow of interstate commerce. See, for example, *NLRB v Jones & Laughlin Steel Corp*, 301 US 1, 23 (1937) (justifying the NLRA on this basis). Certainly the commerce power enables Congress to regulate interstate commerce per se for that purpose. It is doubtful, however, whether that purpose alone will support action under the Necessary and Proper Clause if Congress has not enacted any primary legislation under the commerce power itself. Justice Antonin Scalia raised this point in *Gonzalez v Raich*, 545 US 1 (2005). In that case, it was important to him that the regulation of intrastate activity at issue was in support of a rule about strictly interstate commerce that Congress in fact had adopted, not just one that it could adopt if it wanted to. See *id.* at 37–42 (Scalia concurring).

¹⁸ See 18 USC § 1621; *United States v Williams*, 341 US 58, 68 (1951).

¹⁹ See Patient Protection and Affordable Care Act § 1501(a), Pub L No 111-148, 124 Stat 119 (2010). But see *Florida v US Department of Health and Human Services*, 2011 WL 3519178, *66 (11th Cir).

²⁰ See *United States v Lopez*, 514 US 549, 561 (1995).

more collateral consequences for people's conduct than does the former. If those collateral consequences matter, then it will be important to compare secondary rules with one another.

When government power depends on the reason for which that power is exercised, perhaps a distinction ought to be made between real and pretextual reasons. It is one thing to say that a secondary rule will further the primary goal but another to say that furthering that goal in fact led the legislature to adopt the secondary rule. A requirement that the instrumental connection actually be Congress's reason could impose substantial limits on its power under the clause. For example, the Supreme Court in *NLRB v Jones & Laughlin Steel Corp*²¹ accepted the argument that more harmonious labor relations, achieved through collective bargaining overseen by the NLRB, would reduce strikes and other disruptions of production.²² Reducing disruptions, in turn, would enable interstate commerce to flow more freely, an end the Court accepted under the Commerce Clause proper.²³ Whether that causal connection existed, it is easy to imagine that the protection of interstate commerce alone would not have led Congress to enact such a far-reaching statute. Rather, a belief that the rules of labor law in the NLRA were more just than those of the existing law of contracts may have been crucial in leading Congress to pass the Act. If concerns about interstate commerce were not enough to motivate Congress, then those concerns were in an important sense a pretext. The contention that a pretext does not satisfy the clause is at least as old as Chief Justice John Marshall's statement to that effect in *M'Culloch v Maryland*.²⁴

Another question concerning means and ends is whether side effects matter, and, if so, how. Here, a side effect is a consequence of the secondary rule other than its advancement of the primary goal. Common readings of the clause identify two particular kinds of side effects as potentially important. One is the expansion of federal power. Venerable readings of the clause hold that secondary rules must not expand congressional authority too much, even if they advance primary goals to an otherwise acceptable extent. One such constraint is the requirement that the clause not completely overturn

²¹ 301 US 1 (1937).

²² *Id.* at 42.

²³ *Id.* at 41.

²⁴ 17 US (4 Wheat) 316, 423 (1819) (“[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”).

the principle of enumerated—and hence limited—federal power.²⁵ That consideration very likely drove the Court's attempt in *United States v Lopez*²⁶ to develop formal principles, which in that case centered on the distinction between the economic and the noneconomic, that would keep Congress from possessing plenary legislative authority because of the clause.²⁷

A more elaborate version of this principle is as old as the debate itself. Criticizing the legislation creating the First Bank of the United States, James Madison argued that there is a difference in principle between incidental powers, which can come through the Necessary and Proper Clause, and “independent and substantive” powers, which cannot.²⁸ Madison maintained that chartering a banking corporation was an example of the latter, because the power to create corporations was such an important aspect of the sovereign prerogative.²⁹ He was also clear that if a power were independent and substantive, an instrumental connection with a permitted primary goal was not enough: neither implication nor the clause could supply such powers.³⁰

According to some readings, then, if a secondary rule has the effect of unduly expanding federal power in general, or of exercising a particular category of power, it may be beyond the clause, even if it furthers a permissible goal. Hence, other effects matter insofar as they consist of greater congressional authority.

The second category of side effects that is often thought problematic covers consequences for individual rights, meaning specified individual interests or legal advantages. Some readings of the clause hold that a secondary rule is impermissible, without regard to its instrumental value, if it interferes with particular choices or actions, such as decisions that are important exercises of autonomy.³¹ Speech and religion are natural examples, but it is important to see that this principle may extend to other choices, so that such a limited view of the necessary and proper power would not be redundant of the affirmative limitations (not all of which were in place when the clause was adopted). Decisions regarding healthcare may fall into this

²⁵ See *A.L.A. Schechter Poultry Corp v United States*, 295 US 495, 529–30 (1935).

²⁶ 514 US 549 (1995).

²⁷ See *id.* at 560–61.

²⁸ James Madison, *The Bank Bill* (Feb 2, 1791), in Charles F. Hobson, et al, eds, 13 *The Papers of James Madison* 372, 375–79 (Virginia 1981).

²⁹ See *id.* at 378.

³⁰ See *id.* at 379.

³¹ A leading discussion of this possibility was coauthored by one of the book's authors, Gary Lawson. See Gary Lawson and Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke L J* 267, 326–31 (1993).

category, and they are not as such protected by any of the specific enactments in favor of liberty of conduct.

None of the foregoing questions takes into account the institutional structure of the government and the different perspectives of different decisionmakers. Those perspectives raise another set of important questions. Judgments about instrumental connections and other effects are generally predictive questions of fact, and not questions of law. Yet, a legal norm means that the extent of congressional power depends in part on these judgments of fact, and so in some way brings them within the purview of legal analysis.

This fact about the clause then must be taken into account in a legal system in which governmental institutions other than the legislature address constitutional questions. In particular, it must be taken into account during judicial review, in which courts assess the conformity of congressional statutes with the Constitution, on the assumption that if the former do not square with the latter, then they are to be disregarded as invalid. Judicial review is premised on the assumption that, to a large extent, courts will decide constitutional issues for themselves, and in particular that they are not absolutely bound by any conclusions reached by Congress while legislating.³² But while some degree of judicial independence is fundamental to judicial review, judges and commentators have seriously considered the possibility of some deference to the legislature since judicial review was first practiced in this country.³³

It is unsurprising, then, that one standard candidate for a category of legislative judgments to which courts should defer in constitutional cases is that of the instrumental judgments that must be made under

³² See *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803). See also *City of Boerne v Flores*, 521 US 507, 519–24 (1997).

³³ See, for example, *United Haulers Association, Inc v Oneida-Herkimer Solid Waste Management Authority*, 550 US 330, 349 (2007) (Scalia concurring) (“Generally speaking, the balancing of various values is left to Congress—which is precisely what the Commerce Clause (the real Commerce Clause) envisions.”); *Whitman v American Trucking Associations*, 531 US 457, 474–75 (2001) (“In short, we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”) (quotation marks omitted); *Chevron, U.S.A., Inc v Natural Resources Defense Council, Inc*, 467 US 837, 843 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). See also Felix Frankfurter, *John Marshall and the Judicial Function*, 69 Harv L Rev 217, 228–38 (1955). The argument that courts should give strong deference to legislatures in deciding constitutional questions under American constitutions is older than the Constitution itself, having been raised, for example, by St. George Tucker while arguing a 1782 case involving an attack on the constitutionality of a Virginia treason statute under Virginia law. See William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U Pa L Rev 491, 527 (1994) (noting that Tucker believed a statute had to be “dramatically at odds with the constitution” for it to be unconstitutional).

the clause.³⁴ Considerations of comparative expertise may weigh in favor of deference here. For example, Congress's job is to make policy and, to effectively do so, it must develop the ability to predict the probable consequences of various possible legislative measures. Courts may have a hard time, for example, determining whether the scale of federal borrowing calls for a national bank. Senators and representatives with substantial experience in federal finance, by contrast, may be in a very good position to answer that question. But a constitutional system that places court-enforced limits on legislative power is unlikely to have the judiciary defer completely to the legislature even on factual questions, because to do so would substantially take back the decision to limit the legislature with rules enforced in part through the courts. The appropriate degree of deference has become another important question in the application of the clause, because with a provision that is fundamentally about factual questions of means and ends, deference on policy and factual judgments can have an effect that is practically very similar to an expansion of federal power.

II. THE LEGAL BACKGROUND OF THE NECESSARY AND PROPER CLAUSE

Even those who disagree about the exact significance of the Constitution's history generally agree that it is important. That history includes not only the document's framing and ratification but also the background of its concepts and institutions. To understand the judicial power conferred by Article III, it is common to look to the practices of the English courts that were known to the Framers.³⁵ It is also a standard, though controversial, move to look to the King's authority in understanding the President's authority, and specifically in understanding the executive power referred to in Article II.³⁶

It may be surprising, then, that the historical antecedents of the Necessary and Proper Clause have not been much investigated, despite that clause's centrality. To explain that gap, one might theorize

³⁴ See *Lopez*, 514 US at 616 (Breyer dissenting) ("Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce.").

³⁵ See, for example, *Coleman v Miller*, 307 US 433, 460 (1939) (Frankfurter dissenting) ("Judicial power [under Article III] could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'").

³⁶ A leading example is Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L J 231, 265–72 (2001).

that the clause's great expansion from the 1930s to the 1960s³⁷ coincided with a lack of interest in history among judges and commentators. But the clause has been a constitutional crux since the very beginning, and courts and scholars hardly ignored history while the clause's role was growing. A more likely, or at least partial, explanation is that the clause has no obvious antecedents because the governmental structure in which it operates has no obvious antecedents. The Federal Convention largely invented constitutional federalism, the accompanying principle of limited federal power, and the particular implementation of that principle through a specific enumeration of authority. As the clause is one further piece in that larger and largely novel system, one might think that it has no historical sources in any interesting respect.

One would be wrong. The authors' large claim is that the terminology of the Necessary and Proper Clause, and the concepts that have become familiar in interpreting it, have proximate roots in three bodies of eighteenth century Anglo-American law (pp 4–8). They do not assert that the specific words of the clause had a well-understood and reasonably determinate legal meaning, but they do say that the arrangement the Constitution establishes through those words is quite similar to other legal arrangements that were well known to the framers and other legally sophisticated Americans of their time (pp 4–5). These arrangements are the private law of fiduciaries, the public law of subordinate governmental bodies, and the combined public and private law of corporations (p 8). In all of these contexts, they say, it was common to invest someone with particular authority and then with further power to exercise the primary authority, where the contours of the further power were not specified. These contours were, however, often identified by the words "necessary and proper" and their cognates and relatives. This aspect of these bodies of law, they say, is the Necessary and Proper Clause's immediate historical source (pp 4–8).

A. Fiduciary Law

Chapters 4 and 5, principally the work of Professor Robert Natelson, trace the affinities between the private law of fiduciaries—and specifically grants of power to fiduciaries to act for their principals—and the Constitution. Professor Natelson argues that it is natural to see such connections, because the Framers, following a long line of tradition, regarded governmental authorities as trustees or

³⁷ See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *Tex L Rev* 795, 807–08 (1996).

fiduciaries or otherwise acting on behalf of the people (pp 52–57). He then takes up and treats at length the feature of the private law most relevant to the clause: a distinction between principal and incidental grants. The general principle, applicable but not limited to grants of authority, was that giving the principal brought with it the incidental. For example, a conveyance of a parcel of land could implicitly bring with it another real-property interest required to make the conveyed interest useful, so that a lord of the manor granting land was assumed to give along with it the right to graze livestock on the lord's unfenced pasture (p 64).

In general, Natelson says, when a principal right or power was given, incidental rights or powers came with it automatically by legal implication. But not everyone would know about that implication, so some drafters made the point explicit.³⁸ Natelson identifies three different ways of formulating a clause that would confirm that incidental powers came with principal powers (pp 72–78).³⁹ The word “necessary” and cognates like “needful” figured frequently in such grants (pp 74–78). Sometimes the actual constitutional language, “necessary and proper,” appeared.⁴⁰ According to Natelson, the conjunctive formulation meant that the grantee was being subjected to two distinct standards, so that the grantee's action must be both necessary and proper (pp 77–78). “Proper” was not just another way of saying useful, but rather meant “in conformity with applicable norms,” which in private law delegations generally meant the norms applicable to fiduciaries (pp 78–80).

Chapter 5 then deals specifically with the Constitution. In it, Professor Natelson argues that the Federal Convention used the conceptual tools and terminology of principal grants with explicit incidental accompaniments in drafting the Necessary and Proper Clause (pp 87–93).⁴¹ The word “necessary,” Natelson argues, “was

³⁸ “One might reasonably ask why, if incidental powers tacitly accompanied a grant,” a drafter would include a clause providing for them explicitly (p 76). Natelson cites Lord Coke for the answer that an abundance of caution is useful in drafting for laymen who may not be familiar with what the law requires (pp 76–77).

³⁹ He lists five kinds of additional-powers clauses, but the first two go beyond confirming the availability of incidental powers (pp 72–74).

⁴⁰ See, for example, *John Earl of Buckingham v Drury*, 1 Eng Rep 1454, 1462 (HL 1762); *West v Erisey*, 1 Eng Rep 530, 536 (HL 1727).

⁴¹ He provides a quite circumstantial account of the work of the Convention's Committee of Detail, which produced the phrase “necessary and proper for carrying into execution the foregoing powers” (p 89). But while there are records of the Federal Convention's debates, albeit unofficial and incomplete, there are no such records for the committees, including the Committee of Detail. I have not sought to determine from the available evidence whether his particular claims about who did what and in what order in the Committee of Detail's proceedings are correct. I will note that Natelson is not averse to speculating about unrecorded

inserted into the proposed Constitution to communicate that Congress would enjoy incidental powers. The separate insertion of the word ‘proper’ strongly suggests it had a meaning separate from necessary, and almost certainly a restrictive one” (p 93).

He then turns to the debate over ratification, in which the Anti-Federalists made the clause an important part of their argument that the Constitution would lead to consolidation and despotism, with an omnicompetent national government displacing the states and oppressing the people (pp 94–96). The Federalists denied the charge both generally and as to the clause particularly. They maintained that the clause gave only those powers that were incidental to the primary grants elsewhere in the Constitution, and sometimes argued that the clause was just a rule of construction clarifying that incidental powers were available (pp 97–108).⁴² Natelson also argues that the ratification process provides “some support” for the claim that legislation is “proper” under the clause only if it complies with fiduciary obligations (p 108). After canvassing ratification, he discusses the well-known debate—which centered on the clause—about whether Congress could create the First Bank of the United States. He is struck by the broad agreement (which did not include Alexander Hamilton) about the basic principle that the clause conferred only incidental power, and that an incidental power had to be in some way less significant than the primary power that it served (pp 115–17).

Natelson concludes by drawing out two leading points. First, the clause grants or confirms only incidental powers, and “[t]o be incidental, a power had to be lesser in importance to the principal power” (p 119). “To be ‘proper,’ a law had to be, at the least, in compliance with the fiduciary duties expected of all public officials” (p 119).

exchanges between members of the Convention. At one point, for example, he suggests that Pierce Butler prepared, but did not actually introduce, a motion to remove the word “proper” because “someone pointed out to [him] that the effect of the word ‘proper’ was to *confine* rather than expand the scope of congressional authority—and Butler was an advocate of limiting the federal government to enumerated powers” (p 91), citing Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 236 (Yale rev ed 1931). Could be.

⁴² For example, James Wilson made the point that the clause was subordinate to the main enumeration (pp 97–98), and Oliver Ellsworth, the second chief justice, indicated that it just clarified what would have been the case anyway (pp 98–99). Madison and Alexander Hamilton both made the latter point writing as Publius (pp 99–101). “[T]he Federalists asserted that the Necessary and Proper Clause had no substantive effect, but was merely a recital of the incidental powers doctrine” (p 107).

B. Reasonableness in Eighteenth-Century Administrative Law and the Constitution

Gary Lawson, a leading scholar of administrative law and constitutional structure, and Guy Seidman are the principal authors of a chapter on the administrative law roots of the clause.⁴³ In the eighteenth-century British law of public administration, they identify principles of reasonableness that “required delegated power to be exercised with impartiality, efficacy, proportionality, and regard for people’s rights” and argue that these principles can be found in the clause (pp 120–21).

Their argument begins by finding these principles in preexisting legal practice concerning parliamentary grants of discretion to executive bodies and officials. These grants generally concerned quite practical undertakings, like building sewers and paving streets (pp 122–25). The common law courts found Parliament’s authorizations an implicit requirement that discretion be exercised on reasonable grounds and so did not permit implementing authorities to impose grossly different impositions on different affected individuals or subject them to inconveniences quite out of proportion to the good being accomplished (pp 122–25).

Lawson and Seidman then present a mainly structural argument for the conclusion that the Necessary and Proper Clause incorporates those principles of reasonableness. This argument begins not with Congress and its powers, but with the other two great types of constitutional power, executive and judicial. The exercise of both, they say, involves some discretion. Courts must at least choose decisionmaking methods, and the executive must choose the means to the ends given it by law.⁴⁴ They take it as obvious that those powers must be exercised in a reasonable fashion. Although “[t]here is nothing in Article III that expressly says that judges must decide cases rationally or sensibly” (p 132), surely they must do so. In similar fashion, they take it as given that the executive must perform its function rationally and not, for example, by consulting the stars (pp 132–33). But neither Article II nor Article III says in so many words that the powers granted

⁴³ They are also the principal authors of two chapters, which I will not treat in detail, regarding eighteenth-century British statutes and British and American legal drafting (pp 13–51). Their conclusions are largely negative: there is not much to learn about the clause from those seemingly promising but ultimately uninformative bodies of legal practice (pp 50–51).

⁴⁴ Because the judicial power “includes at least that power (and duty) to adopt decision-making methodologies,” Article III “implicitly grants to federal courts discretionary authority to structure their process of judicial decision-making” (p 131). As for Article II, “a grant of the law-executing executive power carries with it the implied ancillary power to choose means to accomplish executive ends” (p 131).

must be used sensibly. The requirement of reasonableness in using conferred power is just taken for granted, so the Constitution assumes that such principles apply when power is granted, or at least when judicial or executive power is granted (p 133).

While that would have been obvious in late eighteenth-century America, it may not have been so obvious that the legislature was subject to principles of reasonableness. The cases enunciating the reasonableness requirement in England were interpreting parliamentary grants of power, not the power of the legislature itself (p 134). In the British system, the legislative power was supreme, superior to the executive and the courts and not itself subject to law (pp 134–35). A fundamental feature of American constitutional law is that Congress is not Parliament. It is bound by the Constitution and coequal with, not superior to, the executive and the judiciary (p 135). But such was the power of the British model, and the drafters of the Constitution might have been concerned that not everyone would see the disanalogies among the strong analogies between the two legislatures (p 135).⁴⁵ “Accordingly, it would make sense to specify a constitutional constraint on Congress’s discretionary powers, if and when such a constraint was desired. The Necessary and Proper Clause is a sensible, and even obvious, place for such a constraint” (p 135).

According to the authors, the clause thus makes explicit not one but two points that could have gone without saying: Congress has incidental powers of implementation, and these powers are subject to the principle of reasonableness. These two points render the principle of reasonableness central, so Lawson and Seidman then elaborate on it. Drawing on eighteenth-century cases, they identify four requirements. First, the implementing law must not draw unjustified distinctions among the people subject to it, and so it must be impartial (pp 137–38). Second, it must be causally connected to the primary goal by way of advancing that goal (p 139). Third, the means must be commensurate with, or proportional to, the end being achieved (pp 140–41). And finally, in a legal system that cherishes private rights, reasonable exercise of implementing powers would respect those rights (p 141). They then conclude by explaining how the particular words of the clause capture those principles (pp 141–43).

⁴⁵ Indeed, one profound but idiosyncratic student of the American Constitution did conclude that the similarities were greater than the differences, maintaining that the Constitution does not create a system of enumerated powers at all but rather grants Congress general legislative authority. See William Winslow Crosskey, *1 Politics and the Constitution in the History of the United States* 509 (Chicago 1953). It is no surprise that William Crosskey, in discussing the Necessary and Proper Clause, characterized Congress in terms most commentators would think more appropriate for Parliament, as a “sovereign legislature.” *Id.* at 559.

C. Corporate Law

Chapter 7, written by Professor Geoffrey Miller, a leading scholar of corporate law and its history, deals with the corporate law background of the clause. Again, the analysis begins with the observation that the words “necessary” and “proper” were “ubiquitous in corporate practice” in preframing Anglo-American law (p 145).⁴⁶ He begins by noting that the Constitution itself is not simply *like* a corporate charter; it *is* a corporate charter. It establishes a distinct legal entity, sets out the purposes and powers of that entity, imposes limits on those powers, grants exclusive rights and privileges, and provides for the authority of agents and rules of governance (p 147). Furthermore, given the legal background of the Federal Convention’s members, there is “every reason to suppose the members of the Committee of Detail who drafted the Necessary and Proper Clause, in particular, were aware of this corporate law background” (p 149).

Miller then describes his systematic inquiry, in which he read a substantial sample of eighteenth- and nineteenth-century corporate charters.⁴⁷ From that sample he draws a large number of examples, showing that “necessary” and “proper” and words very much like them were very commonly used (pp 152–54).⁴⁸ Miller then sets out six conclusions. First, charter clauses like the Necessary and Proper Clause conveyed ancillary, not independent, authority (p 155). Second, the clause does not confer general legislative power on Congress, because its analogues did not confer general power (p 156). Third, while some charters made their grantees the judges of their own power, the Constitution does not give Congress “unilateral discretion to define whether a given action is within its legislative power” (p 156).⁴⁹ Next, corporate clauses similar to the Necessary and Proper Clause sometimes employed, by way of emphasis, “doublets,” pairs of words that are more or less synonyms. Hence, it is not sound to infer from the fact that there are two words that “necessary” and “proper”

⁴⁶ Professor Miller is careful to match his conclusions to his evidence, noting that “necessary” and “proper” were not defined terms at the time, and their usage was not uniform (p 145).

⁴⁷ Miller’s sample consisted of a number of well-known charters—those of the First and Second Banks of the United States, the American colonies, and the Massachusetts Bay Company—as well as all of the charters issued by two states, Connecticut and North Carolina. He chose these two states in an attempt to avoid bias, on the grounds that they had substantially different economies and, as a result, different types of corporations seeking charters (pp 149–50).

⁴⁸ Those words generally appeared in “scope clauses,” which clarify the purposes and powers set out elsewhere (pp 150–52).

⁴⁹ Miller contrasts the Constitution with charters that, for example, authorized the delegates to take such steps as they might “deem” or “think” to be necessary, proper, convenient, and so forth (pp 156–59). Congress is given power, not to do what it thinks necessary and proper, but what is necessary and proper.

impose independent limitations (pp 159–60).⁵⁰ Fifth, a careful comparison of “necessary” with similar words in corporate charters shows that the clause’s language is relatively demanding as to the instrumental connection between the subordinate and the primary power. In order to be necessary, an implementing step had to be “reasonably closely adapted to achieving the goals for which the institution was formed” (p 171). Finally, in charters that use the word “proper” to perform a distinctive role, the term generally controlled corporate powers with respect to corporate stakeholders such as shareholders. The implication is that, even if a law is necessary, it might be beyond congressional power if, “without adequate justification, it discriminates against or disproportionately affects the interests of individual citizens vis-à-vis others” (p 174).⁵¹ He concludes with the cautionary observation that inference from corporate practice to the Constitution is plausible but not conclusively shown to be correct (pp 175–76).

III. IMPLICATIONS OF THE CLAUSE’S BACKGROUND

A. General Principles Governing Incidental Power

In a way, tracing the Necessary and Proper Clause to multiple bodies of law both weakens and strengthens the conclusions that can be drawn from knowledge of the clause’s antecedents.

They are weaker because several areas of law, and not just one, constitute the background. Legal usage develops terms of art, words, and phrases that have a specific, reasonably well-understood meaning that is different from the ordinary, nontechnical meaning of the words. “Equity” is an example. In its everyday usage, it means justice or doing justice. But in the English legal system it referred to a court with a body of jurisdictional, procedural, remedial, and substantive rules all its own. When Article III refers to cases at equity, it means the kind of cases that would come before the High Court of Chancery, not cases in which the court sought to do justice. If the words “necessary and proper” had been a term of art, then it would be reasonable to conclude that the Constitution uses the words in that sense, provided that the requirements of the applicable interpretive theory were met.

⁵⁰ Miller’s coauthors all conclude that the requirement that laws be “proper” means something other than that they be “necessary” (pp 91, 141–43). Their conclusions are, in a strict sense, consistent with Miller’s, who rejects one particular line of inference to those conclusions, but on this point the book’s authors are not in complete harmony.

⁵¹ Miller puts this point somewhat hesitantly, perhaps because of his prior observation that “proper” may be part of a doublet and hence cumulative of “necessary.” See text accompanying note 50.

For example, Lawson would say that if knowledgeable users of English in the United States in the late 1780s were generally familiar with the fact that “necessary and proper” had a technical meaning, the way that “equity” does, then that technical usage is part of the document’s original public meaning and hence part of its authoritative meaning today.⁵² But because the phrase was used in similar ways in more than one legal context, the task of showing that it had a single, relatively determinate meaning is more difficult. For one thing, the argument must deal with whether the fields of agency, public administration, and corporations, while similar, are similar enough to have used a common term of art despite their differences. To make the argument work, other areas of law in which the same problem and the same words arose must also be surveyed.

The authors do not say that the words “necessary and proper” had become a term of art that was used uniformly in the three fields that they discuss. Rather, they regard the multiple sources and meanings of the clause as a strength of their argument and not a weakness. They show that lawmakers, faced with similar problems, resolved them in basically the same way and expressed that resolution in language quite close to that of the Constitution. The problem was always how to define the authority of a delegee—be it an agent, a public body, or a corporation—so that it would go far enough, but not too far, within the constraints of foresight and language. The answer was to enumerate primary grants of authority and to either imply or make explicit subsidiary authority derived from and closely connected to those grants. This way, the delegating party would not need the complete foresight otherwise required to explicitly identify all possible grants of authority.

This evidence enables the authors to claim that they have identified not a term of art but generally applicable principles that reasonable rulemakers, past or present, adopt when they face a particular problem (pp 7–8). The Constitution’s system of enumerated powers, they suggest, is one instance of this problem. It is an attempt to give a legal actor limited powers that will be fully effective while remaining limited, and to do so in a brief document. Faced with a task similar to that of those who granted power to agents, government bodies, and corporations in Britain, the Framers devised a similar solution and reached for words frequently used to describe it.

Truly general principles are important because they can be attributed either to actual lawmakers or the hypothetical rational

⁵² See Gary Lawson and Guy I. Seidman, *Originalism as a Legal Enterprise*, 23 Const Comment 47, 76–80 (2006).

lawmaker posited by many textualists. But their generality often means that their particular implementation will depend on the context. General principles are like ordinary language as opposed to terms of art; whereas the latter, by design, apply with fixed meaning in every context, the former adapts to the particular circumstances in which it is used. Just as principles of means–end rationality will work a bit differently for private fiduciaries as opposed to public or semipublic corporations, so they will apply differently to the legislature of a compound republic as opposed to an administrative agency.

I raise this point not only because it is generally important, but because I think it says something about one of the authors' specific claims. Professor Miller contrasts implementing-power clauses in corporate charters, some that did and others that did not incorporate deference to the judgment of corporate decisionmakers. He distinguishes charters that, for example, gave authority to corporate decisionmakers to do what they deemed necessary from those that gave authority to do what was necessary with no built-in discretion (pp 156–59). The Necessary and Proper Clause is in the latter category, and so the corporate background suggests that it does not give Congress the additional deference that would apply if it were told to implement its own views as to necessity and propriety.

That argument is sound insofar as it is about the clause itself. But in the context of the Constitution, one branch of government (Congress) decides which laws to enact, and other branches (especially the courts) sometimes must decide whether those laws are valid. It is common for officers of those other branches to say, and perhaps even to mean, that they should give deference to a coordinate part of the government on the great and delicate issue of constitutional interpretation. That rationale for deference is not related to the specifics of the Necessary and Proper Clause. It probably would not have operated for an eighteenth-century corporation, but the new system of government created by the Constitution used familiar pieces to create a whole that was without precedent. The system created by the Constitution is a novel context in which basic ideas may manifest themselves in distinctive ways.

This aspect of the argument has another strength, but I will put off describing it, both because it fits better with a later topic and to maintain narrative suspense.

B. Does the Necessary and Proper Clause Protect Liberty and Equality?

Lawson and Seidman, along with Miller, say—and Natelson indicates—that the clause has some requirement of impartiality. Fiduciaries, public authorities, and corporations were all generally

required to give equal treatment to members of some important group, be it beneficiaries, the public, or stakeholders. Impartiality, as well as its close relative, nondiscrimination with respect to specified characteristics, is central to American constitutional law. The Constitution contains explicit antidiscrimination provisions, such as the Fifteenth and Nineteenth Amendments, and two provisions that are often read as general requirements of impartiality, the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment.⁵³ According to Justice John Paul Stevens, the supposed antidiscrimination principles in the Equal Protection Clause are really just manifestations of a more general requirement imposed by the clause that the government govern impartially in the interest of everyone it rules.⁵⁴ If this sounds like the kind of general impartiality requirement the authors are talking about, it should, because they are almost certainly the same.

The presence or absence of a general requirement that the federal government act impartially is a question of great importance. If, like the Supreme Court, one readily moves from such a general requirement to more particular rules against discrimination on identified bases like race, then its importance may even increase.⁵⁵ These days, the Court finds a general requirement of equality, as well as more specific limitations on discrimination, in the Due Process Clause of the Fifth Amendment.⁵⁶ This has produced much criticism

⁵³ The Fifteenth and Nineteenth Amendments forbid discrimination on specified grounds with respect to a specified legal advantage, the right to vote. See US Const Amend XV (prohibiting discrimination on the basis of race, color, or previous condition of servitude); US Const Amend XIX (prohibiting discrimination on the basis of sex). The Equal Protection Clause says that no one shall be denied the equal protection of the laws, US Const Amend XIV, § 1, and so is formulated as a requirement that everyone be treated the same with respect to a specified legal entitlement, the protection of the laws. According to the equality-based reading of the Privileges or Immunities Clause of the Fourteenth Amendment, by forbidding states from abridging privileges or immunities, it requires that all citizens have the same version of the legal entitlements that fall into that category. The equality-based reading of the Privileges or Immunities Clause was rediscovered by David P. Currie in *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* 347–51 (Chicago 1985) (arguing that the Privileges or Immunities Clause was designed to put into the Constitution the antidiscrimination rule of the Civil Rights Act of 1866).

⁵⁴ See *Craig v Boren*, 429 US 190, 211–12 (1976) (Stevens concurring) (“There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”).

⁵⁵ The Equal Protection Clause does not mention race, but the Court says that it implies a very demanding requirement of justification when the government discriminates on the basis of race. See, for example, *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701, 720 (2007).

⁵⁶ The main source of the contemporary doctrine is *Bolling v Sharpe*, 347 US 497 (1954), which held that school segregation in the District of Columbia, a jurisdiction subject to the

and various attempts at rehabilitation.⁵⁷ It would be quite important to discover that, as Lawson and Seidman say, the Court has been digging in the wrong place, and the Necessary and Proper Clause incorporates broad principles of equal treatment. Given the importance of the clause, such a discovery would have large implications.

Whether the authors' evidence supports such a conclusion, however, is doubtful. In particular, I think they have not demonstrated that prior practice included an independent requirement of impartiality, different from the one derived from the more fundamental requirement of instrumental fit. Consider the example that Lawson and Seidman use of a commission that charged one landowner more than others, even though the expense related to that one was not disproportionately high. The differential treatment there was not related to the purpose of the commission (pp 137–38). None of the authors presents evidence that a distinction that was related to the primary goal would have been thought to be beyond incidental powers, or even subject to what we would call especially strong scrutiny. Rather, impartiality seems to have been just a side effect of requiring a means–end match and the fact that some partial rules do not match. But almost invariably, the kinds of distinctions in federal law that raise concerns about impartiality are defended on the grounds that they are connected to Congress's legitimate goals. In *Metro Broadcasting, Inc v FCC*,⁵⁸ for example, preferences for minority owners of broadcast stations were justified with the argument that the preferences would lead to better broadcasting services for the public, no doubt a permissible goal.⁵⁹ In the absence of a higher-than-normal standard of justification, the preferences almost certainly would have passed muster, as do most of Congress's debatable choices.

Much the same is true with respect to Lawson and Seidman's suggestion that exercises of incidental powers must be rights respecting. Here, too, I think that what looks like an independent limitation is really an aspect of the requirement that the means be adapted to the end, and perhaps that they be proportional as well. As the cases about public authorities demonstrate, in the eighteenth century, rights of private property were the central instance of rights protected by the law. A well-adapted incidental rule may interfere

power of Congress and not of any state, is inconsistent with the Due Process Clause of the Fifth Amendment, which forbids arbitrary classifications. *Id* at 500.

⁵⁷ For a discussion of the controversy over *Bolling* and the case's place in constitutional debate, see Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 Va L Rev 1879, 1897 (2006).

⁵⁸ 497 US 547 (1990).

⁵⁹ See *id* at 552–55.

with those rights. Congress can give census takers reasonable and limited access to private property to determine how many people live in a dwelling, and it can modify rights of liberty by requiring that individuals answer truthfully questions concerning their place of residence, so that the United States can determine the population of each state for apportionment purposes.⁶⁰ It may be that Congress could not authorize census takers to inspect dwellings in the middle of the night, but, if so, that is because the annoyance would be out of proportion to the gain in census accuracy. Rights yield to reasonable regulation unless they are protected by a rule under which they trump an otherwise permissible exercise of power. This is a fundamental feature of the Constitution: grants of power to the national government are subject to affirmative limitations, and the affirmative limitations go beyond the restrictions imposed by the principle of enumerated federal power.

This feature of the system is illustrated by the kind of legal interest that is perhaps more likely to be thought of as a right today than ordinary private property rights or the general liberty to do what one likes. The unamended Constitution, for example, authorized Congress to restrict or eliminate an interest well known to and much cherished by Americans, an interest so important that the Constitution came to call it a right: the civil jury.⁶¹ In the Federal Convention's draft, Congress was free to decide when jury trials would be available in the federal courts. That discretion came from the so-called horizontal Necessary and Proper Clause, which gives Congress power to carry into execution the judicial and executive powers. For example, laws that determine the mode of trial carry the judicial power into execution. Anti-Federalists made heavy weather of this aspect of the plan, and the Seventh Amendment soon changed it, preserving the right to jury trial in suits at common law.⁶² Before that, Congress had the power to override the right to a civil jury, provided it did so in

⁶⁰ Adults are required to answer truthfully the questions posed to them by census takers, see 13 USC § 221, and owners of apartment buildings, among others, are required to give access to their premises to census takers, see 13 USC § 223. The inquiries that must be answered may be more extensive than one might think. For example, in order to implement § 2 of the Fourteenth Amendment, Congress may have a census taker ask an individual's age, sex, and citizenship. (The implication is that there is nothing special about imposing an affirmative duty under the Necessary and Proper Clause.)

⁶¹ The Seventh Amendment preserves "the right of trial by jury" in specified civil cases. US Const Amend VII.

⁶² John Marshall is reported to have responded, in the Virginia ratifying convention, to the objection that the Constitution did not secure the civil jury trial, by arguing that the civil jury was not excluded but permitted and that Congress would provide for it when to do so was expedient, just as Virginia did. John Marshall, *Virginia Ratifying Convention* (June 20, 1788), in Herbert A. Johnson, et al, eds, 1 *The Papers of John Marshall* 275, 285 (North Carolina 1974).

accordance with principles governing the clause, that is, principles of means–end adaptation and possibly proportionality. A rule eliminating the civil jury in complex patent cases almost certainly would have satisfied both requirements, for instance.

C. The Necessary and Proper Clause and the Principle of Enumerated Powers

If I am right that the history of the clause, as the authors present it, does not go very far toward incorporating into it the most familiar forms of affirmative limitations on power—nondiscrimination and rights of liberty—then there remains the possibility that the clause nevertheless is integral to the form of limitation on government that the Federal Convention, at least, thought to be more fundamental: enumerated federal power. Here I think the authors make a strong case that the Necessary and Proper Clause is importantly limited in the incidental powers it authorizes, which raises the possibility that the country's current constitutional practice is seriously out of step with the Constitution's original meaning.

The authors do not fully synthesize into a more unified understanding of incidental powers the conclusions they draw, but I think they point the way fairly clearly. Professor Natelson gives good reason to believe that the clause was inserted out of caution (pp 94–119) and confirms what would otherwise be true: a main power brings its incidents with it (pp 60–67). The negative implication is that it brings only its incidents with it. Professor Miller's work on corporate charters reinforces this view, indicating that grants similar to this one created incidental, and not independent, power (pp 144–55). And Professors Lawson and Seidman argue, although to me a bit less convincingly, that the clause may even have been useful to make clear that Congress's constitutional powers should be understood on the assumption that the legislature is the sovereign's agent and delegate, just like the executive and the judiciary, and not the sovereign itself, the way Parliament was (pp 126–44).⁶³ All of the authors agree that the

⁶³ Professor Lawson and I are both scholars of separation of powers who believe that the fine details of the constitutional structure are very important, so any disagreement between us may seem to the reader like differing counts of angels on pinheads. With that warning in place, I will differ with him and Professor Seidman on this point. They argue that the executive and judiciary are required to exercise their discretion in sensible ways only because they are subject to an assumed principle of reasonableness, also found in (and perhaps derived from) eighteenth-century administrative law. But given the similarity between Congress and Parliament, a sophisticated reader might wonder whether similar limitations apply to the Constitution's legislature. The clause clarifies that they do, and so in effect it is a limitation as much as, or more than, it is a grant (pp 126–36). My hesitation comes when a reasonableness requirement for the executive and the judiciary is attributed to generally accepted principles of administrative law. I

clause originally served as a clarification that Congress has (or has only) incidental powers, not as an additional grant.

This is powerful stuff. It accomplishes what the Tenth Amendment may have been designed, but fails, to do through its text: underline that the principle of enumerated powers is to be taken seriously and that the exercises of the explicitly granted powers are supposed to be Congress's main business.⁶⁴ First, rational drafters do "not . . . hide elephants in mouseholes."⁶⁵ They make their main points explicitly and in primary statements, leaving only lesser matters to implication or follow-up statements. One reason for this is that they are most concerned with the main points and so spend more effort in making sure that these points are included and correctly articulated. Showing that the Necessary and Proper Clause is just a compendious way of attaching secondary and incidental powers to every grant of power reinforces the point that the primary grants are indeed primary and the main focus of the drafters' concern.

Second, the authors' interpretation of the clause helps show that the maxim *expressio unius est exclusio alterius* applies to the Constitution's enumeration of powers. *Expressio unius* is about lists. It operates when a list is implicitly exclusive. Some lists are, some lists are not. The latter often are intended to make sure that some items are included, rather than to exclude anything else. Careful drafters sometimes preface such a list with a phrase like "including but not limited to." The Necessary and Proper Clause shows that the Constitution's drafters considered the possibility that the list might not be adequate. With this in mind, they did not add, "and anything else that would be useful for Congress to be able to do," or any clause along those lines. Rather, they clarified the point about incidental

find reasonableness to be built into the powers conceptually. The judicial power is the power to decide cases according to law and not to go off on unrelated frolics in the process. The executive power is the authority to carry out the law, and so it, too, has an inherent requirement that executive actions be connected to the law being carried out. Moreover, I think the discretion that inevitably comes with either power is more limited than Lawson and Seidman do. For example, I do not believe that the courts have the "power (and duty) to adopt decision-making methodologies" (p 131), if that means to adopt them in the sense that Congress may adopt a tax rate, choosing it to achieve the legislature's conception of the public good. I think that the courts must identify methodologies, but that they are under substantial constraint in doing so. To some extent, the methodologies are given to them as unwritten law that they both shape and are bound by, and when they are shaping the unwritten law here they are supposed to do so in pursuit of goals that are given to them, most importantly that of properly discovering the law and the facts of the cases they decide.

⁶⁴ The problem with the Tenth Amendment is that, as the Supreme Court sometimes has, it can reasonably be read as just a tautology and hence only a reminder. See, for example, *United States v Darby*, 312 US 100, 124 (1940) (holding that the Tenth Amendment states the "truism" that what is not surrendered is retained).

⁶⁵ *Whitman v American Trucking Associations, Inc.*, 531 US 457, 468 (2001).

powers and then stopped. Stopping where they did is significant because it represents the drafters' response to the question whether the list is long enough. The fact that they said no more is much less likely to have been an oversight considering their understanding of the clause.

The clause thus locates the Constitution one step—but only one step—beyond the Articles of Confederation when it comes to the status of the enumeration. The Articles embraced a principle of strict construction of power grants to the United States.⁶⁶ The clause clarifies that the Constitution does not contain this principle insofar as it would bar incidental powers. But the principle must be limited to incidental powers, because if it applied to more than that, it would subvert the purpose of enumeration. The clause is the sort of thing that drafters use when their confidence in their own foresight is substantial but not complete, or, more specifically, when they think they have sorted out the big issues to their own satisfaction and want to make sure that strict construction does not interfere with sorting out the details later.

So understood, the clause requires strong, though not absolute, means–end connections between primary goals and secondary rules, a conclusion consistent with Professor Miller's findings about the word "necessary" in corporate charters (pp 149–54). That is because the primary grants have both an affirmative and a limiting function, as their boundaries are the boundaries of federal power, and those boundaries are an important part of the scheme. With a strong causation requirement, the enumerated powers operate in just that way, as their substance determines their limits by dictating the content of ancillary steps that Congress may take. The powers thus supply the principles of limitation.

The authors' understanding of the clause also strongly suggests that the side effect of expanding federal power, to use the terms I suggest above, is important, and that the clause limits that effect. Again, this follows from the way in which that reading underlines the importance of the enumeration's limitations. The enumerated powers are to be primary and their incidental implementations secondary with respect to the extent of federal power. This indicates that two particular concepts that Lawson and Seidman discuss—proportionality and least restrictive means—match this reading of the clause well. If the bulk of the effects of an ostensibly incidental rule are unrelated to the ostensible goal, then the

⁶⁶ See Articles of Confederation Art II ("Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by the confederation expressly delegated to the United States, in Congress assembled.").

goal has lost its primacy. When that happens, the secondary rule is not proportioned to the primary goal, precisely because so much of what it does is unconnected to the goal. In such situations, it will often be the case that some other secondary rule, with much more limited effects, could have furthered the primary goal to the same extent. It is, for example, almost certainly possible to limit disruption of interstate commerce from strikes without comprehensively regulating labor-management bargaining, and the effects of doing the latter extend well beyond the freeing up of interstate commerce.⁶⁷

On one quite important point, the book does no more than tantalize. This point is whether it is possible to say that some implementing steps that Congress might take are impermissible because they would involve the use of a power that is itself, in Madison's words, "independent and substantive."⁶⁸ An independent and substantive power would be one that can be described clearly enough so that it is possible to tell when Congress is using it, and that is excluded by the *expresio unius* principle because it is so important that the Federal Convention, or a hypothetical rational drafter, would have included it if Congress had been meant to have it. Madison's best-known example is the power to charter corporations, which was at stake in the struggle to establish the Bank of the United States. The power to issue corporate charters is such a central aspect of sovereignty, he reasoned, that the drafters' decision not to explicitly grant it must be tantamount to the decision to withhold it, and not simply to leave open the question whether chartering is incidental to some explicit power.

That reasoning is fine in form, as it is a sensible way of taking seriously both presence and absence in the enumeration, but filling in the substance is famously difficult. Especially considering the vast array of purposes for which an entity might be created, that such an entity can have a separate legal personality probably does not seem like a huge matter to most people today. Early twenty-first-century Americans are thus probably much in sympathy with Hamilton, who

⁶⁷ Whether individual legislators must be sincere in their motivation, a question raised above, is more difficult, and the content of the Necessary and Proper Clause may well have little to do with it. The answer depends in large part on the analytical categories into which constitutional provisions fall. The clause is primarily a grant of power, and as such prescribes no duties for legislators with respect to their exercises, or attempted exercises, of those powers. It is possible that the empowering provisions, or in my view more likely other aspects of the Constitution, do impose some duties, including, for example, a duty to use (or seek to use) a power in accordance with the purpose set out in the Constitution. This is a fundamental question, but it is not specific to the Necessary and Proper Clause.

⁶⁸ Madison, *The Bank Bill*, in Hobson, et al, 13 *The Papers of James Madison* 375–79 (cited in note 28).

said that the power to create a corporation was incidental, not primary. He said that the reason Congress could not create a corporation to handle safety and sanitation in Philadelphia was not that it could not create corporations, but that it had no power connected to keeping Philadelphia secure and clean.⁶⁹

Evidence about prior practice in fiduciary, administrative, or corporate law is not likely to be of much use on this topic, because the Constitution is such a different context. Congress is not a sovereign, but a legislature, elected by the people and vested, for example, with the awesome powers of war and taxation. A power that would be independent and substantive in the hands of a trustee, or even a public corporation or agency not directly representing the people, might be incidental for a body that is authorized to appropriate the people's revenue, spend it on a military force, and send that force to conquer another country.

The difficulties in identifying independent and substantive powers, the absence of which implies their unavailability to Congress, are a serious obstacle to articulating the principle of enumerated powers in a workable form. That point is highlighted by the Supreme Court's current doctrine regarding § 5 of the Fourteenth Amendment and the other enforcement powers attached to affirmative limitations.⁷⁰ According to the Court, legislation to enforce the other provisions of the Amendment must exhibit congruence with—and, remarkably enough, proportionality to—that end.⁷¹ The Court in *City of Boerne v Flores*⁷² prominently cited *M'Culloch* but did not connect its test under § 5 to Chief Justice Marshall's descriptions of power under the Necessary and Proper Clause.⁷³ The implication is strong that the requirement of congruence and proportionality is stronger than that under the clause. Yet the enforcement provisions were modeled on the earlier clause and have the same means–end structure. What accounts for the difference?

⁶⁹ Hamilton, then secretary of the treasury, made that argument in his opinion, prepared at President George Washington's direction, on the constitutionality of the First Bank of the United States. Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (1791), in Harold C. Syrett, ed., 8 *The Papers of Alexander Hamilton* 63, 100–01 (Columbia 1965).

⁷⁰ All such powers appear in amendments. The fact that the original Constitution's affirmative limitations and other non-power-granting provisions, like the Fugitive Slave Clause, came with no explicit power to enforce them gave rise to a long and often bitter debate about the presence or absence of such power. See generally, for example, *Prigg v Pennsylvania*, 41 US (16 Pet) 539 (1842). The enforcement powers in the amendments are in part a response to that earlier uncertainty.

⁷¹ See *City of Boerne v Flores*, 521 US 507, 519–20 (1997).

⁷² 521 US 507 (1997).

⁷³ See *id.* at 516–29.

One explanation is that the Court in *City of Boerne* was protecting its own turf. A power to enforce a constitutional limitation can easily turn into a power to determine the content of the limitation, and much of the case was devoted to the conclusion that Congress has no power over the actual meaning of the amendment. Indeed, in reaching that conclusion, the Court went so far as to disapprove a long-bruited reading of its earlier case, *Katzenbach v Morgan*.⁷⁴ The Court, a cynic might think, is more concerned about congressional attempts to usurp the judicial power than congressional attempts to exercise power retained by the states or the people.⁷⁵ A more charitable explanation is that the task under § 5 is easier than that under the Necessary and Proper Clause, precisely because in the former context there is a working definition of the independent and substantive power that Congress does not have: the power to determine the content of the amendment. To say that an exercise of the § 5 power is proportioned to its permissible goal is in large part to say that it does not amount to a redefinition of the substance of the Fourteenth Amendment. That negative reference point, usually absent in Necessary and Proper Clause analysis, makes it possible to say when the § 5 power has gone further than it should.

IV. THE NECESSARY AND PROPER CLAUSE IN LIGHT OF DIFFERENT CONSTITUTIONAL THEORIES

The authors do not seek to defend a methodology, in part because they do not agree on one, and hence do not offer any conclusions about what anyone should do with the arguments that they present about the original understanding (p 8). It is almost inevitable to ask, if they are right, what that means. And on what assumptions does one's answer to the preceding question depend?

According to one important theory of the American legal system, the significance of the authors' claims is seriously limited because the written Constitution, however its meaning is to be determined, is only one component of the country's actual constitution. Professor Richard Fallon is the most profound and explicit contemporary exponent of this position.⁷⁶ Drawing on H.L.A. Hart's understanding of law about

⁷⁴ 384 US 641 (1966). The Court in *City of Boerne* rejected the claim that *Morgan* recognized "a power in Congress to enact legislation that expands the rights contained" in § 1 of the Amendment. *City of Boerne*, 521 US at 527–28.

⁷⁵ See *City of Boerne*, 521 US at 524 (discussing the drafting of the Fourteenth Amendment and concluding that "the power to interpret the Constitution in a case or controversy remains in the Judiciary").

⁷⁶ See Richard H. Fallon Jr, *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 NCL Rev 1107, 1113 (2008):

how legal systems work as a matter of fact, Fallon maintains that it is a fact that American legal and governmental practice does not take the written Constitution as its ultimate touchstone. The document is important, to be sure, but it is only part of the story. There are constitutional prohibitions and permissions that cannot be reconciled with it and that have developed in the time since it was adopted. The Supreme Court's doctrine is an especially important source and indicator of the non-Constitution constitution, though it is not alone in those functions.

If Hart is right, as I believe he is, and the content of legal rules is ultimately a question of fact, whether Fallon is correct depends on the hard factual question whether the basic rule of the American legal system is simply to follow the written Constitution. I believe that the written Constitution and only the written Constitution satisfies Hart's criteria, but take this position with some hesitation, because whether it does is not easy to determine. If Fallon is correct, and contra-Constitution practice establishes other legal principles as fundamental, then it is very likely that one such principle is that federal power is not limited in the way a reasonable reader of the Constitution would expect it to be. This is perhaps the most striking way in which actual constitutional practice is difficult to reconcile with the text. For someone who agrees with Fallon and adopts this jurisprudential position, the authors' evidence will be unconvincing, because the Necessary and Proper Clause is exactly the portion of the written Constitution that has been superseded in actual legal practice.

Another standpoint from which the authors' evidence would be of only limited importance retains the text as the only constitution but understands it in a highly purposive way. If this way of thinking about the Constitution is as common as I suspect, especially with

Constitutional originalists and textualists, who dislike this state of affairs [in which changing judicial precedent changes the practical meaning of the Constitution], protest that the meaning of the Constitution, as the fundamental law, is necessarily unchanging, and that the practice of modern Justices, judges, and lawyers cannot legitimately alter it. As I have said, many law students and concerned citizens assume intuitively that the originalists must be correct in this jurisprudential premise. But arguments of this kind miss the point that it is impossible to say what the fundamental law *is* except in reference to the practice of Justices, judges, and other contemporary officials. To cite examples to which I shall refer often, it is doubtful, at the very least, that the Constitution would originally have been understood to permit Congress to establish a Social Security system or to authorize the printing of paper money, rather than providing for coinage. Nevertheless, the Social Security system and paper money are constitutionally valid today because they are recognized as such under what H.L.A. Hart classically described as practice-based "rules of recognition" for determining constitutional validity, and they would remain valid even if it could be established decisively that they are incompatible with the original understanding.

For Hart's position, see generally H.L.A. Hart, *The Concept of Law* (Oxford 2d ed 1994).

respect to congressional power, then it is important to identify it in describing interpretive positions for which the historical evidence does and does not matter powerfully.

To see the nature and attraction of this interpretive stance, it is useful to observe that although the book (and hence this Review) are about the Necessary and Proper Clause, discussion of congressional power over economic activity and decisions is routinely conducted in terms of the Commerce Clause, full stop.⁷⁷ Sticklers may respond that the topic is really the Commerce Clause plus the Necessary and Proper Clause, because, for example, production is not commerce,⁷⁸ and staying at a hotel while engaged in interstate commerce is not itself interstate commerce.⁷⁹ A hyper-stickler, having read this book, could answer that the stickler's point is just an artifact of the particular drafting strategy of the Federal Convention, which could have left incidental powers to implication by the main powers, in which case the question really would always be what the main power entails. But something more fundamental is going on, and the tendency of the Necessary and Proper Clause to drop out of the argument is an indicator of what that thing is.

A standard way of reconciling the broad current sweep of congressional legislation with the Constitution's enumeration of powers is to say that this is a situation in which an unchanged rule produces quite different results because of changes in the world. The relevant change in the world is the dramatically increased interconnectedness of the economy, with, for example, many more economic actors doing business in more than one state. In that form, though, the argument is subject to the objection that the Constitution does not give power over economic activity generally but over particular forms of commerce. The conceptual distinction between manufacturing (or agricultural production) and commerce is as meaningful today as it was in 1787.

In order to support the extent of economic regulation in which Congress now engages, an argument about an unchanged principle applying to changed circumstances will work much better if the unchanged principle is not limited to the text of the Constitution but rather incorporates a purpose attributed to it. One standard justification for including the interstate commerce power in the

⁷⁷ See, for example, *Lopez*, 514 US at 552 (“On appeal, respondent challenged his conviction based on his claim that [the Gun Free School Zones Act] exceeded Congress’ power to legislate under the Commerce Clause.”); *id.* at 556.

⁷⁸ See *Carter v Carter Coal Co.*, 298 US 238, 303 (1936) (“Production is not commerce; but a step in preparation for commerce.”).

⁷⁹ Consider *Heart of Atlanta Motel, Inc v United States*, 379 US 241, 258 (1964).

enumeration is that if those decisions were left to the states, then they would engage in individually rational, but collectively irrational, protectionism, adopting regulations of trade that would help the regulating state at the expense of others.⁸⁰ Understood more generally, and without regard to the Necessary and Proper Clause, the purpose of the Commerce Clause itself was to centralize economic regulatory power in situations in which its dispersion would have adverse effects for the country as a whole.

And that is the purpose of the vast bulk of economic regulation found in current statutes, at least according to supporters of that regulation. A pervasive rationale along these lines is that, left to themselves, the states will engage in destructive competition, whether it be with respect to the minimum working age or the minimum wage or pollution control.⁸¹ Another is that efficiencies can be achieved by having one set of rules and perhaps one agency of government to administer them, as opposed to many.⁸² If the Commerce Clause is to achieve its purpose, and that purpose is to give Congress the power over economic affairs that a federal system needs, then much legislation that has little or nothing to do with commerce narrowly understood is nevertheless authorized by the clause—and that legislation is a primary, not incidental, application of the power. An interpreter who takes this approach to the text, regarding it as a relatively rough marker for purposes that are the true law, will have

⁸⁰ See *Gibbons v Ogden*, 22 US (9 Wheat) 1, 224 (1824) (Johnson concurring):

For a century the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad.

This was the immediate cause, that led to the forming of a convention.

⁸¹ According to the Court in *United States v Darby*, 312 US 100 (1941), the purpose of the Fair Labor Standards Act was

to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states.

Id at 109–10.

⁸² See Robert D. Cooter and Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan L Rev 115, 160 (2010).

little concern with the Necessary and Proper Clause, and hence little concern with the authors' findings.

It is important to see that the purposive argument just outlined is originalist in form, because the purpose to which it appeals is that of the Framers, or the ratifiers, or whatever actual or theoretical people in the late eighteenth century are being treated as authoritative. To say that the authoritative people, whoever they are, had no such purpose is to argue over substance, not interpretive method. As students of American constitutional history know, lots of purposes, goals, and values, characterized at various levels of abstraction, can be attributed to the Framers or their document. Some consider it a strength of a purpose-based reading. Others consider it a weakness.

Just as purpose-based constitutionalism can be originalist, so, too, the evidence presented in the book can be used by a nonoriginalist, which is the strength that I have saved for now. Despite the fact that the authors are talking about legal practices in the eighteenth century, and hence about the actual historical background of the Constitution, the relevance of their work is not so limited. I suggested above that because the same solution—granting limited but unenumerated incidental powers to an agent—appears in several legal settings, one could reasonably conclude that the solution is generally applicable.⁸³ Although the legal settings that the authors describe are all from the period shortly before the Framing, there is no indication that eighteenth-century fiduciary law, for example, was anything other than fiduciary law. The authors can thus plausibly be said to have identified not a standard eighteenth-century solution to a recurring eighteenth-century problem, but a standard reasonable solution to a recurring problem in the drafting of legal instruments.

If that is so, then their findings should be of great interest to anyone who wants to take the specifics of the text seriously, with or without regard to the particular historical era in which it was adopted. It is, after all, a constitution designed to endure for ages to come.⁸⁴ Its text therefore should reflect principles that are enduring, even if not utterly timeless.

⁸³ See Part III.A.

⁸⁴ Chief Justice Marshall was discussing the Necessary and Proper Clause, and the breadth of Congress's discretion thereunder, when he wrote that "[t]his provision is made in a constitution designed to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *M'Culloch*, 17 US (4 Wheat) at 415.

